SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 177

J. W. KOHN, M. S. KOHN and J. W. KOHN, Administrators of the Estate of Carrie Kohn, Deceased.

Appellants,

vs.

CENTRAL DISTRIBUTING COMPANY, INC., and THE COMMONWEALTH OF KENTUCKY, ETC., et al,

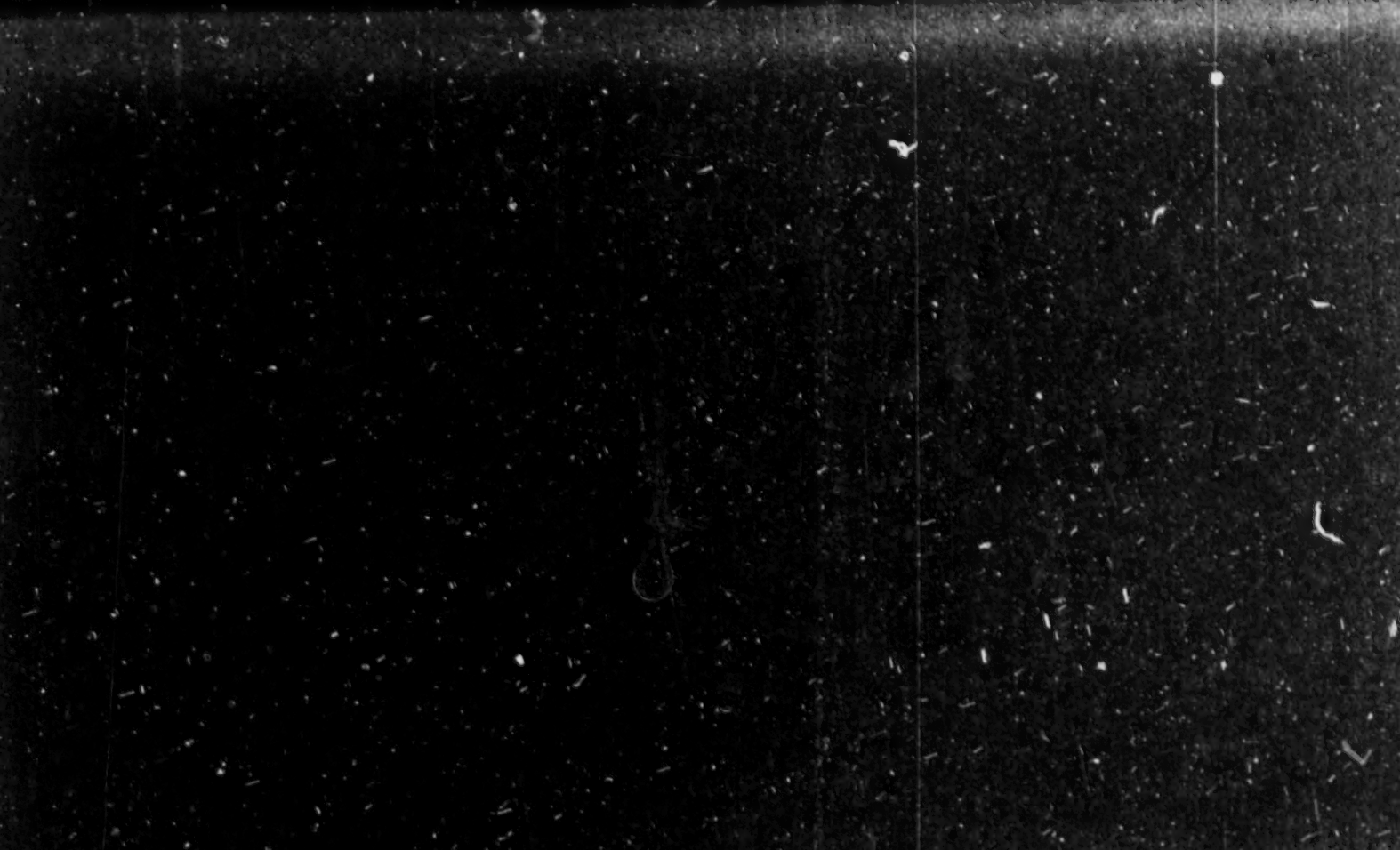
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Filed July 5th, 1938

REPLY BRIEF FOR APPELLANTS

HARVEY H. SMITH, Attorney,
WILLIAM A. SCHUBERTH, Counsel.
SMITH & SCHUBERTH, Counsel,
Counsel for Appellants.



INDEX

FEDERAL AND STATE CITATIONS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 177

J. W. KOHN, M. S. KOHN and J. W. KOHN, Administrators of the Estate of Carrie Kohn, Deceased,

Appellants,

vs.

CENTRAL DISTRIBUTING COMPANY, INC., and THE COMMONWEALTH OF KENTUCKY, ETC., et al,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

Filed July 5th, 1938

REPLY BRIEF FOR APPELLANTS

Assignment of Error, 2, 5—10, Sec. (238 J. C.)

POINTS 4, 5, 6, 7, 15

Index to Points Discussed:

secures their mortgage note for money loaned a licensee.

At page one, is a gross mis-state ent of fact.

"Proceeding with the prosecution of a suit previously instituted in the Franklin Circuit Court, the fiscal court of the commonwealth, to collect excise taxes alleged to be due the commonwealth."

There was no suit brought against these Appellants, citizens of Ohio. The Code of Kentucky provides that no such suit may be maintained until the mortgagees are made parties. This was done by order of Court (after the filing of this action) and they were served, and did not make their voluntary appearance, but made their objection in due time after service to the jurisdiction of the Franklin Circuit Court. Nor has the Court yet held it has such jurisdiction, and it could not proceed, while this action, as to the Appellants was pending in the United States District Court for the Eastern District of Kentucky. They had the right, as diverse citizens, to bring this action independent of any proceeding in the state court against the state's Co-Defendant.

There never was a Writ of Prohibition filed in this case, and it would be immaterial if there had been. There was never such an action brought by the state's Co-Defendant against it.

There was an injunction to prevent cancellation of its charter and license to do business, and this was denied by the Court, but at no time and in no respect did these Appellants file any such an action, except a mandatory injunction in Campbell County, the proper court of jurisdiction, to require the state to open the business place, which Appellee, the state had closed, and this injunction was **granted and made permanent.**

No such injunction was denied by the Court of Appeals of Kentucky, in any matter where these Appellants were

made parties, or affecting their right of action to sue in this court.

Exhibit A is no part of this record, and will be stricken under the rules of this court for that reason alone, and it may be stricken for another reason, it is not this action, and these Appellants were not parties to it.

Appellants have a constitutional right to proceed in this court by appeal and in the court below, and the legislature of Kentucky nor its courts have any authority in the state of Kentucky to such restrictive right by law.

There is no law anywhere to require a defense to be filed by Appellants in any suit brought by the state in a state Court. They may serve the Appellants, as they did, but after the bringing of this action in the Court below.

Although the state was proceeding in the state court to serve these Appellants, after the filing of this suit, and although Appellants undenied but sworn to, petition in the Court below, faced that Court, admitting the facts shown in the record at page 3 (TR) by Appellant's motion for Confession of Judgment, under the then existing rules.

28 U. S. C., sec. 723.

Rule 5 provides for default pro-confesso, and this means, on the record presented, that all facts were admitted and confession made, since Appellants filed their motion — see motion for judgment page 27 (TR).

Rule 12 provides that this rule, pro-confesso, may be taken by motion.

Rule 17 provides, that after thirty days, the judgment shall become final.

The original petition was filed on the 25th day of February and the Amended petition, April 11th, 1938. Thus elapsed, the 21 days after service of summons on the

original petition. This would be 15th of March for answer. None was filed.

On the 14th of April, Appellants were entitled to Judgment absolute on all the issues presented. Rule 17, made it impossible for the Court to act unless "the court shall at the same term set aside the same".

RULE 16 says:

"It shall be the duty of defendant, unless the time shall be enlarged to file his answer. In default thereof, the plaintiff may, at his election, take an order as of course that the bill be taken pro-confesso; and thereupon the cause shall be proceded in ex-parte."

It is Appellant's contention that, the motion for judgment must be treated as confessed, and the three judge court could not entertain on April 16th a motion to dismiss an Original or Amended petition confessed by law and the rules of the Court where filed.

Rule 19 permitted Appellants to file their amended petition which was a continuation of the original filed February 25, and to which the motion for judgment applied.

Appellants contend that this court must order the cause returned to the District or three judge court with direction to enter judgment in all particulars as alleged in the Appellants Original and Amended petition Ex Parte, and that Appellees can not **now file any pleading.**

Rule 30 provides an answer must be made, and that all averments not denied, not relating to value or damage, shall be deemed confessed if answer not filed.

Under Rule 32, after filing Amended Bill, if filed after answer by defendant, ten days shall be allowed for defendant to plead, but if no answer is or has been filed, the amended Bill is treated as an undenied original bill.

At page 5 it is said, (Appellees Brief).

"Since the three judge court concurred with counsel for Appellee that this case presented but one question".

A look at the order and judgment will prove our contention, that the Act of 1934, void and repealed, presented no remedy, and it was specifically written in the order at Appellant's demand, that, "temporary and permanent injunction be denied, and the motion over-ruled. It being the opinion of the court that petitioners have an adequate remedy in section 12 of the legislative Act of 1934". This to narrow the issue.

This Act never existed and was repealed March 7th 1938, prior to the hearing, and under the decisions of both Kentucky and the United States had no relief virtues after that date for any purpose.

Summarize Appellee's Argument

At page six of Appellee's brief, is injected a statement, which is no part of this record nor based on anything in this record, and is false. Counsel never at any time entered appearance in a cause now pending in the Franklin Circuit Court. These Appellants were served, and appeared and challenged the jurisdiction of the court, but never entered appearance.

Statute referred to at pages 6 and 7 in respect to appeals has no application here, in view of the judgment of the three judge court just quoted.

The balance of page 7 sets out a statute relating to forthcoming redelivery of property, which the Appellants may have availed themselves of. Regardless of this statute, which has no place here, the three judge court specifically grounded their decision on a specific ground of adequate remedy under the Act of 1934. That is the judgment appealed from. Is it good or not?

The State Court cannot prescribe remedies to be pursued to a foreign citizen in a Federal Court, especially when such citizen proceeds, first, in the Federal Court.

C. and G. Company vs. Harris, 235 U. S., page 292.
Hunter vs. Conrad, 85 Federal, 803.

The three judge court must realize the defendant w in default, and it could not consider any question except admitted, an exparte proceeding. The case must go ba on the merits, even though the section 12 of the 1934 A had virtue claimed.

The pendency of this action in the Federal Court by t Kohns was a bar to any proceeding against them in t Franklin Circuit Court—too well settled to require auth ities.

Examine the 1934 Act Argued at Page 10, etc.

The authorities cited here might be applicable and pe tinent in a proper record, they will not be argued he

The Act of 1934 is at issue on the **order of dismissal.**

That Act provided that "the aggrieved **taxpayer** mig bring the action in two years".

It has no application to Appellants, because they a not taxpayers. They are mortgagees entitled to asse seized of their mortgagor, and as diverse citizens, t amount in excess of three thousand dollars, with Appelle **in default, they are entitled** to judgment. That is so mu clear law, that we will ignore the argument of Appellee page 11 of its brief.

Such a provision, if valid would have no application to suit for return of Import Taxes. How could the legislatu prescribe how illegal import taxes should be collected a citizen of Ohio?

He does not come into a state court of Kentucky. comes into a national court to invoke a national constit tional right, and the fiat of a Kentucky legislative Act h not feather weight as an argument.

Fudging is a mild term to be applied to Counsel's brief, from the first to the last word, but at page 15 the limit is reached we think. Here is a supposed decision in an action where Appellants are not parties. A decision, not in this case but in another, where the court adds a decision to the many inglorious decisions of this once esteemed judge.

Read it, then get the citation, which is omitted by counsel, and this court will see that not only has the case no application here, because it is no part of the record, and should be stricken, but it does not decide any such thing as the court says, as a reading will show.

It decides only one question. That a litigant licensee under the Act of 1934 cannot challenge the constitutionality of that Act. Lueke vs. Mescall, 272 Kentucky, 771.

It does not decide that it is constitutional.

Let this court mind, this opinion was rendered March 28th, 1938, "the present Alcohol Control Act In Kentucky" was the Act of March 7th, 1938, not at issue in the case at all, but the Act of 1934, then repealed by the Act of March 7th, 1938, nearly a month before the decision of the court. The court may have had a case of "incongruous memoritis", which sometimes afflicts judges as well as litigants. The present Act on March 28, 1938, was not the Act of 1934.

The case does show that the injunction sought was to prevent cancellation of the Charter of the co-appellee, the Central Distributing Company. It had no relation to any fact litigated here. We are not discussing the right of Central Distributing Company to retain their license. That was the issue there.

Appellee's exhibit at page 16 must be stricken, because this order of dismissal stands alone on the right of suit under section 12 (really 2) of the Act of 1934, and has no relation to the law of the exhibit. That Exhibit is the general law on appeal, and the Act of 1934, section 2 is a

special Act prohibited by section 59 of the Constitution of Kentucky, against special legislative Acts and section 51.

For reasons stated, Exhibit C is not the provision referred to in the order of dismissal, distinctly affirmed by the three judge court opinion, after challenge of Appellant's counsel.

The Act if valid or existing or a part of the record, would not have any territorial force over the collection of invalid import tax in the hands of the state. Besides it is amendment to the Act of 1934, both of which violates the revision clause of the Constitution of Kentucky, section 51, page 32, Appellants original brief.

Such an import tax violates the Federal constitution and the Constitution of Kentucky, section 171, which prohibits the levy of any tax outside the jurisdiction of Kentucky. The levy of import tax is a tax to be paid by wholesalers of other states, charged to their clients in Kentucky.

Thus a wholesaler who pays a license tax in Kentucky to engage in wholesale of interstate commerce whiskey and domestic intra state whiskey pays another license tax to import foreign made liquors, which under the Kentucky constitution is double taxation. See page 43, original brief of Appellants.

The United States Supreme Court has held in McCullough vs. Maryland, 12 Wheaten, U. S. page 419.:

> "All must perceive that the tax on the sale of an article imported into the state is a tax on the article itself".

It could not be a license federal tax, because it is a tax on the whiskey. It could not be a Kentucky license tax for two reasons, it is outside the limits of the state when levied, and it would be a double license tax. The Distiller pays 5 cents as the manufacturers tax-an advalorem tax The same Act levies a property advalorem tax on the whole

saler for importing, which is a tax on the article, and if he sells it in Kentucky he must pay another tax of $1.04 per gallon in order to sell it in Kentucky.

Now he has paid a license tax of $1,000 to do business.

He is paying a license tax and two advalorem taxes.

The wholesaler's license under the Act of 1934 gave him the right to buy, sell and transport liquors, domestic and imported liquors.

The law is discriminatory, because it forces the wholesaler to pay a 5 cent tax on imported whiskey, and no 5 cent tax on the domestic article. This is an unlawful discrimination against imported whiskey and an exemption under the Kentucky Constitution, which is prohibited by the Bill of Rights. No tax shall be levied outside of the territorial limits of the state and no exemption shall be granted in the levy of the tax.

Taxes are levied on property and licenses are levied on privileges. The former is levied for revenue purposes and the latter under the police power of the state, granted to it by the 21st Amendment.

Rule 9

The Appellees must designate the points relied on in their defense and serve them. This they have not done. They must confine their argument and points to the record stipulated in this cause, and therefore under rule 9 of the Supreme Court of the United States nothing else may be considered.

> "The court will consider nothing but the points of law so stated and the parts of the record so designated."

The entire brief of Appellees should be stricken.

We respectfully submit that this record has presented a case, where only ex parte consideration is to be given by the court.

Did the three judge court have any right or authority of law to enter the order of dismissal? The right to injunctive relief was admitted on the record; the right on the merits to foreclose Appellant's mortgage was admitted. The right to judgment for the import taxes had and received was admitted, and the issue of jurisdiction. The unlawful seizure of the property of these Appellants was admitted; the validity of their mortgage was admitted and undenied. Therefore, did the Amended petition state a cause of action to support the judgment on these issues.

SUPPLEMENTAL BRIEF

It is contended that Jurisdiction here may be extended only if the Appellants are denied an interlocutory injunction.

Section 238 Judicial Code U. S., applies to a permanent injunction or dismissal of an action.

Jurisdiction extends to all questions raised by the Bill and not to a single one, where the petition asks for different relief.

The Appellants as citizens of Ohio, suing both Appellees, citizens of Kentucky, jurisdiction lies to enforce their mortgage, since they have the constitutional right, and have elected to foreclose it in the United States Court.

Howard vs. Gipsy Oil Co., 247 U. S., 503;
Champ vs. Boyd, 229 U. S., 530-551-552;
McGowan vs. Parish, 237 U. S., 285.

A suit to determine a tax levied against commerce between the states, is a question of Federal jurisdiction, and is determined without suit in a state court.

St. Louis Railway vs. State of Arkansas, 235 U. S., 350.

When the Federal Court first obtains jurisdiction it retains it, and may by injunction prevent litigants from proceeding in another court.

Here the suit was pending in the Federal Court long before the Appellants **were served in the state court.** To prevent a multiplicity of suits, it will determine the jurisdiction for all purposes, and if it has jurisdiction for one, it will consider all questions raised by the pleadings.

Undenied petitions, where value and damages are not to be determined, a common law issue, a motion for judgment under the rules must be sustained, and the judgment becomes final unless **the practice prescribed is followed.**

If the Court denies injunction, and there are other issues under the pleadings, these issues must be determined, and dismissal is error. Proceeding is then under section 238 Judicial Code.

L. and N. vs. Garrett, 231-303 and 304 (U. S.);

Siler vs. L. and N. Railroad, 213 U. S., 175;

C. and G. vs. Harrison, 235 U. S.;

Oklahoma vs. Wells Fargo, 223 U. S., 295;

Schaffer vs. Carter, 252 U. S., page 37, Judicial Code 238 (US).

Indirect Import Tax, must be treated as a direct tax on Commerce.

Galveston vs. Harrisburg, 210 U. S., 217.

Such a tax as here laid violates "fair cash value levy of taxes", and is discrimnatory. The Wholesaler pays the revenue tax on imports and the domestic liquors are not taxed. This is an unlawful exemption of the domestic wholesaler. If it be contended that the Distiller pays the domestic tax then it lacks uniformity, whether it is an excise or a property tax and is arbitrary classification.

Cumberland and Penn Railroad Co. vs. Maryland, 40 Maryland, 22.

Article 1, sec. 1, U. S. Constitution.

Nathan vs. State of Louisana, 8th Howard, 77.

Woodruff vs. Parham, 8 Wall, 140.

There is no exercise of police power here but a revenue power. If the tax is an excise tax it is void, as discriminating against wholesalers engaged in interstate commerce. It is not a license tax protected by the 21st Amendment.

County of Clara vs. Southern Pacific, 18 Fed., 385.

Such a tax is discrimnatory and lays a burden on interstate Commerce.

Crew-Levick Co. vs. Penn., 245 U. S., 292.
Minnesota Rate Cases, 230 U. S., 352.

If it grant a license to engage in interstate commerce by the levy of a tax it violates the Constitution of the United States.

This was decided in McCullough vs. Maryland, in 12 Wheaton, and in Ward vs. McCullough, 12 Wall, 418 and 430 (US).

It is an indiscriminate tax, levied against imported liquor, whether sold in the state of Kentucky or not.

The Rule of Construction of Tax Statutes.

In Kentucky the rule of construction is strictly against tax statutes and in favor of the tax payer.

Martin vs. F. H. Bee, 271 Kentucky, 829.

A claim assigned, valid in itself, concerning commerce may be collected in the United States Court. It is a tax imposed under Federal authority by a state that does not exist as a taxing power.

Munson vs. North American Ins. C., 85 Federal, 802.

The Lueke vs. Mescall case, 272 Kentucky, 771 injected here, outside of the record, does not decide anything concerning the constitutionality of the 1934 Act. It is based on the case of Stein vs. Kentucky Tax Commission, 266 Kentucky, page 469, where it is said, we distinctly avoid deciding the constitutionality of the Act (1934). We decide that a licensee, who has had the benefit of the Act cannot assail the Constitutionality of the Act.

Section 19 of the Constitution of Kentucky prohibits the

hearing of offenses, penal in character committed under, and violative of, the Act of 1934, and prohibits the enforcement of penalities under it, which is sought to be enforced against the res, on which Appellants had a valid mortgage, proceeding under the Act of 1938, of March 7th, because it violates the prohibition of **ex post facto** legislation. The penalties died, and hence there could be no such suit.

Speckert vs. City of Louisville, 78 Kentucky, 88.

As the diverse Appellants had a right to proceed to collect their mortgage note in the Federal Court and protect their lien, manifestly there was no adequate remedy by appeal, beyond the territory of Kentucky, and if such had been the case, the remedy could not prevent Appellants from proceeding in the Federal Courts under the diverse citizenship Act. If the United States Court took jurisdiction for one purpose, then it had the right to decide all questions. In Frieberg vs. Dawson, 255 U. S. Supra page 288, and in the same case, 274 Federal page 255, it assumed that right, and the three judge court held and decided every issue raised by the pleadings.

Inasmuch as this is also a case to collect taxes levied under Article 1 section 8 of the Constitution of the United States, and the diversity of citizenship exists, there can be no question of jurisdiction in the Federal court, and no question that a mortgage lien must be protected by injunction since the state of Kentucky absolves itself from liability in damages in an action brought by its Revenue agent, who gave no bond for the attachment run against these assets, the property of the mortgagee, who concededly owed the State of Kentucky nothing.

The statute quoted, as applying the adequate remedy doctrine, has no extra territorial effect.

Respectfully submitted,

HARVEY H. SMITH, Attorney,
WILLIAM A. SCHUBERTH, Counsel.
SMITH & SCHUBERTH, Counsel,
Counsel for Appellants.